92-7944

Supreme Court, U.S.
FILED
MAR 12 1993
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

SYVASKY LAFAYETTE POYNER,
Petitioner,

v.

EDWARD W. MURRAY,
ELLIS B. WRIGHT, JR.,
and JOHN DOE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Fourth Circuit Exceed Its Jurisdiction By Issuing a Mandate Ordering the United States District Court for the Eastern District of Virginia to Dismiss Poyner's § 1983 Lawsuit on an Appeal of a Discovery Order Entered in the Ordinary Progress of Poyner's Lawsuit While Defendants' Motion to Dismiss Was Still Pending in the District Court Prior to Briefing and Oral Argument?

2. Did the Court of Appeals for the Fourth Circuit Err By Failing to Consider the Claims in Poyner's Complaint Challenging Virginia's Electric Chair and Virginia's Execution Procedures When It Issued a Mandate Ordering the United

States District Court for the Eastern District of Virginia to Dismiss Poyner's § 1983 Lawsuit?

3. Did the Court of Appeals for the Fourth Circuit Err In Basing Its Decision to Issue a Mandate Ordering the United States District Court for the Eastern District of Virginia to Dismiss Poyner's § 1983 Lawsuit on the 100-year-old precedent of In re Kemmler, 136 U.S. 436 (1890)?

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IV.

PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a Writ of Certiorari issue to review the order of the Court of Appeals for the Fourth Circuit dated January 19, 1993, issuing a mandate to the United States District Court for the Eastern District of Virginia to dismiss the class action § 1983 lawsuit filed by Petitioner on behalf of himself and others similarly situated.

V.

OPINIONS BELOW

Poyner was originally convicted of five counts of capital murder in 1984 in the respective circuit courts of Williamsburg, Hampton, and Newport News. Poyner was sentenced to death for each count. As of that time, Virginia's statutes required that death sentences be carried out by electrocution at the State Penitentiary in Richmond. Va. Code § 53.1-233 (Repl. Vol. 1988), amended, Va. Code § 53.1-233 (Repl. Vol. 1991)(the amendment rescinded the requirement that executions be performed in Richmond). Poyner appealed the convictions and death sentences to the Supreme Court of Virginia, which affirmed each conviction and death sentence. Poyner v.

Commonwealth, 229 Va. 401, 329 S.E.2d 815, cert. denied sub nom. Poyner v. Virginia, 474 U.S. 865 (1985). Although Poyner generally challenged the constitutionality of Virginia's capital murder statute on direct appeal to the Supreme Court of Virginia, see Poyner v. Commonwealth, 229 Va. at 406, 329 S.E.2d at 820, he did not challenge the method of execution as it existed at that time. A petition for a Writ of Certiorari was denied by this Court on October 7, 1985. See Poyner v. Commonwealth, 474 U.S. 865, 888 (1985).

Poyner attempted unsuccessfully to collaterally attack the convictions through petitions for habeas corpus relief in state and federal courts. Poyner filed petitions for writs of

habeas corpus in each of the convicting courts. Each court denied the respective petition after hearing argument but without evidentiary hearings, and the Supreme Court of Virginia refused Poyner's petitions for appeal. This Court subsequently denied Poyner's Petition for writ of certiorari. Poyner v. Bair, 488 U.S. 871 (1988).

Poyner then sought relief in the federal courts, filing three separate petitions for writs of habeas corpus in the United States District Court for the Eastern District of Virginia on January 12, 1989. A United States Magistrate recommended that all three of Poyner's petitions be denied and dismissed. By three orders, dated December 21, 1990, the district court adopted and approved

the findings and recommendations of the magistrate's reports, denied Poyner's objections thereto, and dismissed his petitions. Poyner's appeals to the Court of Appeals for the Fourth Circuit were denied on May 8, 1992. This Court denied Poyner's Petition for Writ of Certiorari on November 2, 1992.

Poyner recently attempted to raise the issue of the constitutionality of Virginia's method of execution by electrocution in federal court in a class action under 42 U.S.C. § 1983, but was denied the opportunity to present his evidence there. Poyner v. Murray, No. 92-CV-815 (E.D. Va. filed Dec. 10, 1992).[1] The Fourth Circuit thwarted Poyner's attempt to present evidence on

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[1]Appendix, pp. 1 - 55 (hereinafter A ___.)

this issue when, on appeal of a simple discovery order and without briefs or arguments, it ordered the case to be dismissed. Poyner v. Murray, No. 93-6052 (4th Cir. January 19, 1993).[2] The Fourth Circuit's order did not even address Poyner's claim concerning Virginia's particular method of electrocution; rather, the court relied on numerous cases standing for the proposition that electrocution is not per se unconstitutional. The Fourth Circuit's Order also did not consider directly the issue that was raised in the notice of appeal, but took the extraordinary step of directing the District Court to dismiss Poyner's lawsuit forthwith with prejudice. The

[2]A69-A77.

Fourth Circuit's Mandate issued that same evening.[3] Poyner's subsequent petition for rehearing, petition for rehearing en banc and petitions for a recall of the mandate were denied. Poyner v. Murray, No. 93-6052 (4th Cir. February 17, 1993).[4]

This petition for certiorari to this Court seeks review of the Fourth Circuit's Order issuing a Mandate to the District Court to dismiss Poyner's § 1983 class action lawsuit.

[3]A78.

[4]A79-A81.

VI.

JURISDICTION

Petitioner seeks review of the Court of Appeals for the Fourth Circuit's Order entered on January 19, 1993, issuing a Mandate to the District Court to dismiss Petitioner's § 1983 class action lawsuit.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

VII.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1292 provides, in relevant part:

> [T]he courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, . . . or the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . .

VIII.

STATEMENT OF THE CASE

On December 10, 1992, Syvasky L. Poyner, on behalf of himself and all others similarly situated, by counsel, filed an action based on 42 U.S.C. § 1983 seeking a declaration that the administration of death sentences by electrocution as practiced by the Commonwealth of Virginia constitutes cruel and unusual punishment, such that the Commonwealth must be enjoined from performing executions in this manner. (A1-A55). Poyner contended that an evidentiary hearing on the nature of electrocution, which was to include testimony of preeminent experts in the relevant fields of science and medicine, was necessary to determine whether the

long-established but rarely-challenged principle that electrocution is not cruel and unusual still holds true upon an examination with the benefit of modern medical knowledge.

After filing his Complaint on December 10, 1992, Poyner attempted to obtain discovery in the ordinary course of the litigation by filing discovery requests, including the ones that resulted in the District Court's Order at issue here. (A56-A66). He sought to observe and videotape the testing of the electric chair, to videotape the execution of Charles Sylvester Stamper, scheduled for January 19, 1993, and to have a neuropathologist observe Stamper's autopsy and perform a routine examination of his brain tissue. The District Court

heard oral argument on Poyner's discovery motions on January 15, 1993, at which time the defendants' Motion to Dismiss and Motion for Protective Order, among other motions, were pending. Poyner's time to file his opposition briefs to these motions had not yet run, oral argument had not yet been held and, consequently, the District Court had not yet ruled on defendants' motions.

On the afternoon of January 19, 1993, the District Court issued its Order related to Poyner's discovery motions, granting certain requests relating to the testing of the electric chair and the autopsy. (A56-A66). Later that same day, the defendants filed a notice of appeal challenging only the District

Court's ruling regarding Stamper's autopsy. (A67-A68).

Notwithstanding the agreement of both the defendants and the Court of Appeals for the Fourth Circuit that the case presented an issue of immense public importance, on January 19, 1993, the Fourth Circuit panel abruptly directed the District Court to dismiss Poyner's Complaint. (A69-A77).

The matter came before the Fourth Circuit panel on defendants' notice of appeal from the District Court's order permitting discovery. (A67-A68). As a result of the Fourth Circuit Court's action, this "case of considerable public interest" and the factual issues raised by it remain unresolved -- thus prolonging, for the antiquated technology

of the electric chair, one hundred years of unwarranted immunity from public scrutiny.

The precedents on which the Court of Appeals based its ruling descend from a decision that bears no relevance to modern jurisprudence, medicine or technology. That case, In re Kemmler, 136 U.S. 436 (1890) reviewed a New York county court decision that did not concern the Eighth Amendment, imposed on the defendant a burden of proof inconsistent with Eighth Amendment jurisprudence, gave undue deference to the factual findings of the New York state legislature, and considered, to the extent it considered it at all, medical and scientific knowledge now obsolete. Accordingly, Kemmler and its progeny have

become factually and legally irrelevant to the question whether electrocution is cruel and unusual. One hundred years of reliance on a foundation so infirm should not now shield the executioner's methods from view.

The Fourth Circuit's decision also misapprehends the actual allegations of Poyner's Complaint, (A1-A55), which do not merely challenge electrocution per se, but also attack Virginia's particular chair and Virginia's particular procedures for the use of that chair. The Fourth Circuit's decision rests entirely on cases concerning non-particularized attacks on electrocution and overlooks that portion of Poyner's Complaint that attacks Virginia's particular chair and Virginia's

particular procedures. Such allegations as these have received a hearing in federal courts. That the Fourth Circuit overlooked these aspects of the case is understandable, since Poyner never had the opportunity to file briefs on these issues either in the Fourth Circuit or in the District Court, and even the defendants never filed briefs in the Fourth Circuit.

Even if all this were not true, this Court should grant petitioner a writ of certiorari and reverse the Fourth Circuit's ruling to correct the Fourth Circuit's erroneous assumption of jurisdiction. The Fourth Circuit's decision assumed appellate jurisdiction under 28 U.S.C. § 1292(a)(1) of what the panel construed as a granted injunction,

although the District Court's discovery order under Federal Rule of Civil Procedure 34(a)(2) did not accord or protect any of the relief requested in the Complaint. Courts have consistently ruled that orders that do not accord or protect the substantive relief requested in the Complaint are not injunctions appealable pursuant to § 1292(a)(1). Thus the Fourth Circuit panel's decision overlooks material factual and legal matters and is in conflict with decisions of the Fourth Circuit and other courts of appeals. The District Court's order, which in no way pertains to the relief requested in Poyner's Complaint, quite simply was not an injunction for the purposes of § 1292(a)(1). Consequently,

the Fourth Circuit lacked jurisdiction to direct dismissal of the Complaint.

Courts are charged with the duty to ensure that no prisoner be subjected to cruel and unusual punishment, no matter how unpopular his crime. The courts cannot discharge this duty without taking evidence.

The Circuit Court for Loudoun County agreed that a Virginia court must hear evidence on this very issue.[5] The Circuit Court for Loudoun County recognized that no court has reviewed the medical and scientific evidence concerning electrocution in over 100 years, and that no court has ever taken

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[5]Poyner's counsel had appeared as special counsel for the defendant White for the sole purpose of presenting the constitutional challenge to Virginia's particular form of electrocution.

evidence on Virginia's method of electrocution. In setting aside five days to receive evidence, that court stated:

> And certainly science and technology has advanced an awful lot since 1890. And I feel somewhere a court has got to hear the evidence of what the state of the art is now on the effect of electricity on the human body during the course of execution by electrocution in Virginia.

Transcript, Commonwealth v. White, Circuit Court for Loudoun County, Crim. No. 8129 (February 11, 1993), at 5. (A82-A91). The evidentiary hearing, however, never took place because the Commonwealth dropped the capital murder charge the next day and rendered the issue moot.

Poyner simply wants an opportunity to be heard on this issue. The Fourth

Circuit's premature dismissal of Poyner's action has denied him this opportunity. Poyner asks this Court to issue a writ of certiorari to review the Fourth Circuit's Order and thereafter to reverse the Order to allow Poyner to present his evidence before the District Court. As both the Fourth Circuit and defendants noted, this case arouses considerable public interest and concerns a matter of grave public importance. In light of the matters set forth above, this is a matter of exceptional importance deserving the grant of certiorari review.

IX.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals Did Not Have Jurisdiction To Issue Its Order Because The District Court's Order Was A Non-Appealable Interlocutory Discovery Order.

The Court of Appeals for the Fourth Circuit did not have jurisdiction to consider the appeal of the discovery Order relating to the autopsy of Charles Sylvester Stamper or to direct the District Court to dismiss Poyner's Complaint. While the Court of Appeals did not cite the statute upon which it relied for jurisdiction,[6] it is apparent

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[6]It is clear that the District Court's Order permitting discovery of Stamper's autopsy was an interlocutory order, not a final judgment subject to appeal pursuant to 28 U.S.C. § 1291. Nor did the District Court's Order contain a statement that an immediate appeal pursuant to 28 U.S.C. § 1292(b) was
(continued...)

from the language of the Order that it was relying upon 28 U.S.C. § 1292(a)(1):

> [T]he order of the district court is not any routine discovery order but is, in fact, an injunction and we treat it as such. There is no doubt that a refusal to comply with the district court's order of January 19, 1993 would be punishable by contempt.

Order (January 19, 1993), at 2 (A69-A77).

However, even the most routine discovery orders may be punishable by contempt. See, e.g., In re Howe, 800 F.2d 1251 (4th Cir. 1986)(punishing lawyer for contempt for failure to answer interrogatories and requests for

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[6](...continued) appropriate. Moreover, the defendants did not seek a writ of prohibition or mandamus pursuant to 28 U.S.C. § 1651, and in any event, discovery orders issued in the normal course of litigation are self-evidently not a usurpation of judicial power.

production). For the purposes of obtaining jurisdiction under 28 U.S.C. § 1292(a)(1), an "injunction" must be designed to accord or protect some or all of the substantive relief sought by a complaint in more than temporary fashion. North Carolina Ass'n of Black Lawyers v. North Carolina Bd. of Law Examiners, 538 F.2d 547, 548-49 (4th Cir. 1976); Gon v. First State Ins. Co., 871 F.2d 863, 864-65 (9th Cir. 1989), citing 16 Wright, Miller, Cooper and Gressman, Federal Practice and Procedure: Jurisdiction § 3922 at 29 (1966).

The Gon court noted that, in assessing appealability, injunctions must be distinguished from orders regulating the conduct of litigation. Gon, 871 F.2d at 865. Discovery orders are among those

orders "regulating the conduct of litigation" that are not considered injunctions for the purposes of § 1292(a)(1) jurisdiction, even though they are punishable by contempt. North Carolina Ass'n, 538 F.2d at 548-49; Gon, 871 F.2d at 865; 16 Wright, Miller, § 3922 at 30. Similarly, the court in International Prods. Corp. v. Koons, 325 F.2d 403, 406 (2d Cir. 1963) noted:

> We think it better . . . to continue to read § 1292(a)(1) as relating to injunctions which give or aid in giving some or all of the substantive relief sought by a complaint . . . and not as including restraints or directions in orders concerning the conduct of the parties . . . unrelated to the substantive issues in the action, while awaiting trial.

Otherwise, every discovery order would be immediately appealable because it is

punishable by contempt. Such a dramatic change in normal procedure would defeat the principle of avoiding piecemeal appeals. See Switzerland Cheese Ass'n v. E. Horne's Market, Inc., 385 U.S. 23 (1966).

The District Court's discovery Order granted no part of the substantive relief sought by plaintiff's Complaint, which sought a declaration that Virginia's mode of execution by electrocution is cruel and unusual punishment and an injunction against further use of that method by the Commonwealth. Rather, the Order would have permitted Poyner to have an electrical engineer inspect and videotape the electric chair on a day when no execution was planned and to have a neuropathologist observe a routine

autopsy and conduct an examination on a sample of brain tissue that was to be made available by the routine removal and sectioning of the brain by the state pathologist.

The District Court's Order merely provided Poyner with discovery reasonably calculated to assist in proving his case so that he might eventually obtain the substantive relief he seeks. As such, it was not an injunction for the purposes of 28 U.S.C. § 1292(a)(1). The Court of Appeals had no jurisdiction to entertain the defendants' appeal of a portion of the interlocutory discovery Order entered by the District Court. This Court, therefore, should reverse the January 19, 1993 Order entered by the Fourth Circuit

and recall the Mandate that that Court issued on January 19, 1993.

B. The Court Of Appeals Ruled Incorrectly On The Merits Of Poyner's Claim Because It Misconstrued The Nature Of The Action.

In addition to acting without jurisdiction, the Court of Appeals for the Fourth Circuit acted without the benefit of a full record for its consideration.[7] The Fourth Circuit

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[7]In both cases cited by the Fourth Circuit to support its extraordinary action in dismissing plaintiff's lawsuit, and unlike this case, the courts had a complete record on which to base their decisions. In Deckert v. Independence Shares Corp., 311 U.S. 282, 287 (1940), this Court held that a court of appeals could dismiss and terminate litigation if "insuperable objection to maintaining the bill clearly appears." However, in Deckert, defendants' motions to dismiss had been briefed fully, argued, and ruled upon by the district court. Further, the (continued...)

panel's summary (and unexpected) Order that Poyner's entire case be dismissed was entered without briefing or oral argument, either in the Court of Appeals or in the District Court. Had there been a fully-developed record for the Fourth Circuit panel to consider when it ruled on the merits of Poyner's action, it

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[7](...continued)
defendants specifically appealed the district court's disposition of their motions to dismiss. Thus, the court in Deckert had before it a full record regarding the motions to dismiss.

Similarly, in State ex rel. Tindal v. Block, 717 F.2d 874 (4th Cir. 1983), cert. denied, 456 U.S. 1080 (1984), the Fourth Circuit recognized the necessity of a full record before a court of appeals dismisses a plaintiff's claims. In Block, the Fourth Circuit noted that it would not normally consider and dispose of an issue raised but not considered by the district court, but made an exception in Block because the record was "fully developed." Id. at 880.

would have realized that Poyner was seeking an evidentiary hearing both to show how Virginia's particular methods and procedures for electrocution inflict cruel and unusual punishment on condemned inmates and to disprove the 100-year-old factual premise of In re Kemmler, 136 U.S. 436 (1890), upon which the body of precedent cited by the panel has unquestioningly been built.

1. Poyner's Complaint Challenges Virginia's Electric Chair And Virginia's Execution Procedures As Well As Electrocution Generally

By abruptly dismissing Poyner's lawsuit without the benefit of a complete record, the Fourth Circuit misconstrued Poyner's action as solely a broad-based attack on electrocution. In its Order,

that Court stated that Poyner's "case essentially contests the validity of the Virginia statutes requiring execution by electrocution as being invalid in violation of the Eighth Amendment because electrocution is cruel and unusual punishment." Order at 2. (A69-A77).

In fact, Count II of Poyner's Complaint specifically addresses electrocution as it is carried out in Virginia. As such, Count II is not a broad attack on electrocution per se, but rather brings into question whether executions as carried out in Virginia's electric chair violate the Eighth Amendment prohibition against cruel and unusual punishment.[8]

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[8]To the extent that this Court may determine that Poyner has not raised a (continued...)

No court has reviewed evidence about Virginia's electric chair to determine whether Virginia is unnecessarily torturing prisoners. Even if electrocution is a constitutionally permissible form of capital punishment, the Fourth Circuit's reasoning is fundamentally flawed because it presumed all forms of electrocutions to be per se constitutional in every case. But, even if electrocution is a constitutionally permissible mode of capital punishment,

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[8](...continued)
claim in Count II that specifically refers to Virginia's electric chair and the manner in which electrocutions are carried out in Virginia, Poyner respectfully requests the opportunity to amend Count II to state such a claim. Under ordinary procedures, the District Court would have considered such an amendment under Fed.R.Civ.P. 15 (amendments granted liberally) during its deliberations on the motion to dismiss pending below.

not every form of electrocution is automatically constitutional.[9] Stated another way, if all forms of electrocution were presumed constitutional and if the Director of Corrections decided to execute prisoners by hooking them up to car batteries and electrocuting them over a span of hours or days, no court would be entitled to review evidence of this torture method. The irony is that Poyner has alleged a far more painful torture, but he has not been allowed his day in court to prove it.

Yet, the Fourth Circuit's order has laid down a per se rule, without taking

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[9]Likewise, though the death penalty has been consistently ruled constitutional, not every method of inflicting capital punishment is per se constitutional.

any evidence, that no federal court can review a claim pertaining to Virginia's electric chair.[10] In essence, that Court is deferring to the Department of Corrections.

Because Count II raises a claim regarding Virginia's chair, cases supporting the proposition that electrocution is not per se cruel and unusual do not apply. The holdings in Kemmler and its progeny do not prevent an action from proceeding where the claim

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[10]In several cases, courts have considered challenges and permitted evidence related to a specific electric chair, as opposed to electrocution per se. See, Thomas v. Jones, 742 F. Supp. 598 (S.D. Ala. 1990); Ritter v. Smith, 568 F. Supp. 1499, 1562 (S.D. Ala. 1983), aff'd in relevant part, rev'd in part on other grounds, 726 F.2d 1505, 1519 (11th Cir. 1984), cert. denied, 469 U.S. 869 (1984); Buenoano v. Dugger, Slip Op. No. 90-473-CIV-ORL-19, 1990 WL 119637 (M.D. Fla. 1990). (A 35(?) -).

relates to the application of electricity in a particular fashion.

2. This Court Should Also Reverse The Fourth Circuit's Summary Dismissal Because The 100-Year-Old Precedent Is No Longer Legally Or Factually Supportable.

Because of the sudden and unexpected dismissal of his case, Poyner was unable to present his arguments to disprove the 100-year-old factual premise of In re Kemmler, 136 U.S. 436 (1890), upon which nearly every case cited by the Fourth Circuit panel was based.

Execution by electrocution was examined by the New York state courts in People ex rel. Kemmler v. Durston, 119 N.Y. 569 (1890), and reviewed by this Court in Kemmler before any such executions were actually conducted in the United States. Thus, any evidence

presented to the New York court on the effects of electrocution was necessarily speculative. In its January 19, 1993 Order, the Fourth Circuit cited numerous federal and Virginia decisions for the proposition that execution by electrocution is constitutional and does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. However, every case cited in that Order can be categorized in one of two ways: (i) decisions that cite no authority for upholding the constitutionality of electrocution,[11] or

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[11] Jones v. Whitley, 938 F.2d 536, 542 (5th Cir.), cert. denied, __ U.S. __, 112 S. Ct. 8 (1991); Lindsey v. Smith, 820 F.2d 1137, 1155 (11th Cir. 1987), cert. denied, 489 U.S. 1059 (1989); Watson v. Blackburn, 756 F.2d 1055, 1058 (5th Cir. 1985), cert. denied, 476 U.S. 1153 (1986); Johnson v. Kemp, 759 F.2d 1503, (continued...)

(ii) decisions that rely on Kemmler, or on other decisions which, in turn, rely on Kemmler.[12] In no case did a court

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[11](...continued)
1510 (11th Cir. 1985), aff'd, 781 F.2d 1482 (11th Cir. 1986).

In Lindsey, the Court held the appellant's claim that death by electrocution is cruel and unusual punishment was precluded by Johnson v. Kemp, 781 F.2d 1570 (11th Cir. 1985) (per curiam). We have searched that opinion for any mention of electrocution. It is assumed the Lindsey court miscited the opinion of Johnson v. Kemp, 759 F.2d 1503 (1985), cited just above, in which the contention that death by electrocution violated the Eighth Amendment was dismissed as frivolous without authority.

[12]McCleskey v. Kemp, 481 U.S. 279, 299 (1987) (dictum); Rummel v. Estelle, 445 U.S. 263, 288 (1980) (Powell, J., dissenting); Ingraham v. Wright, 430 U.S. 651, 667 (1977); Estelle v. Gamble, 429 U.S. 97, 102 (1976) (Does not discuss death by electrocution, but states that punishments are cruel when they involve torture or a lingering death); State ex rel Francis v. Resweber, 329 U.S. 459, 463 n.4 (1947); Lowenfield v. Phelps, 817 F.2d 285, 298 (5th Cir. 1987), aff'd, 484 (continued...)

consider modern medical evidence of the

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[12](...continued)
U.S. 231 (1988) (incorporating the district court's opinion at 671 F. Supp. 423 (E.D. La. 1987)); Wilson v. Butler, 813 F.2d 664, 678 (5th Cir. 1987), cert. denied, 484 U.S. 1079 (1988); Porter v. Wainwright, 805 F.2d 930, 943 n.15 (11th Cir. 1986), cert. denied, 482 U.S. 918 (1987); Funchess v. Wainwright, 788 F.2d 1443, 1446 (11th Cir.), cert. denied, 475 U.S. 1133 (1986); Sullivan v. Dugger, 721 F.2d 719, 720 (11th Cir. 1983); Corn v. Zant, 708 F.2d 549, 563 (11th Cir. 1983), cert. denied, 467 U.S. 1220 (1984); Spinkellink v. Wainwright, 578 F.2d 582, 616 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979); Ralph v. Warden, 438 F.2d 786, 789 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972)(dictum); Jackson v. Bishop, 404 F.2d 571, 577 (8th Cir. 1968); Stockton v. Commonwealth, 402 S.E.2d 196 (Va.), cert. denied, __ U.S. __, 112 S. Ct. 280 (1991); Hoke v. Commonwealth, 377 S.E.2d 595 (Va.), cert. denied, 491 U.S. 910 (1989); Townes v. Commonwealth, 362 S.E.2d 650 (Va. 1987), cert. denied, 485 U.S. 971 (1988); Beaver v. Commonwealth, 352 S.E.2d 342 (Va.), cert. denied, 483 U.S. 1033 (1987); Stockton v. Commonwealth, 314 S.E.2d 371 (Va.), cert. denied, 469 U.S. 873 (1984); Martin v. Commonwealth, 271 S.E.2d 123 (Va. 1980); Hart v. Commonwealth, 109 S.E. 582 (Va. 1921).

physiological effects of intentional electrocution.

The Supreme Court of Virginia first reviewed the constitutionality of execution by electrocution in Hart v. Commonwealth, 109 S.E. 582 (Va. 1921), which relied on the holding in Kemmler as the foundation of its decision. It is noteworthy that in Hart, the Court supported its method of reviewing Eighth Amendment challenges to Virginia statutes by citing to Aldridge's Case, 2 Va. Cas. 447, 449, 450 (1824), in which the Virginia Court had ruled that it is not cruel and unusual punishment to sentence a "free person of color" convicted of grand larceny to be sold into slavery, banished from the United States, and whipped 39 times. Hart, 109 S.E. at 587.

This Court should not adhere blindly and uncritically to these outmoded precedents. In light of modern medical and scientific evidence, Kemmler is no longer a viable foundation for the proposition that death by electrocution is not cruel and unusual punishment.

In Kemmler, the New York county court reviewed evidence presented to it and ruled that it did not overcome the presumption of the constitutionality of the legislation under the New York State Constitution (the Eighth Amendment not yet being considered applicable to the states) because the proof did not demonstrate "beyond doubt" that death by electrocution was cruel and unusual. Kemmler, 136 U.S. at 442. The standard of proof required by the court for this

first challenge to electrocution, therefore, was the extraordinarily high "beyond doubt" standard, which would not apply to the § 1983 action at issue here.

The New York State Supreme Court and Court of Appeals affirmed the ruling of the county court, but on the grounds that the courts were not competent to second-guess the factual findings of the legislature with respect to the constitutionality of legislation.[13]

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[13]The New York Supreme Court stated that "there was nothing in the constitution of the government or in the nature of things giving any color to the proposition that, upon a mere question of fact involved in legislation, the judgment of the court is superior to that of the legislature itself, nor was there any authority for the proposition that in respect to such questions, relating either to the manner or the matter of legislation, the decision of the legislature could be reviewed by the court." Kemmler, 136 U.S. at 442-43. It (continued...)

This Court affirmed the decision of the New York Court of Appeals on the grounds that, because the New York legislature had determined that electrocution did not inflict cruel and unusual punishment and the New York courts had sustained that

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[13](...continued) held that the presumption that the legislature had ascertained the facts necessary to determine constitutionality "was conclusive upon the court," noting that it agreed that the evidence presented did not meet the standard of proof that would be required to overcome that presumption. Id.

The New York Court of Appeals affirmed the decision of its Supreme Court on similar grounds, holding that "[i]f it cannot be made to appear that a law is in conflict with the constitution, by argument deduced from the language of the law itself or from matters of which a court can take judicial notice, then the act must stand. The testimony of an expert or other witnesses is not admissible to show that in carrying out a law enacted by the legislature some provision of the constitution may possibly be violated." Id. at 443.

determination, New York had not abridged Kemmler's privileges or immunities, nor denied him due process of law. Id. at 449.

Since this Court's ruling in Kemmler, the federal courts and numerous states courts have cited that decision for the proposition that death by electrocution is not cruel and unusual. Although the law, scientific knowledge and society's sensibilities have developed and evolved considerably in the last one hundred years, casting serious doubt on the basic legal and scientific underpinnings of Kemmler, the decision has inexplicably endured as the basis for courts all over the land to uphold electrocution, regardless of the particular method, as a constitutional

means of execution. Modern medical and scientific evidence proves that Kemmler is no longer a viable foundation for the proposition that death by electrocution can never be cruel and unusual punishment.

The precedential value of Kemmler has eroded for several reasons. First, courts no longer defer to state legislatures in the way the New York state courts and United States Supreme Court deferred to the New York legislature in Kemmler. The Fourth Circuit, in Ralph v. Warden, Maryland Penitentiary, 438 F.2d 786 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972), upheld the authority of the federal courts to review a state legislature's decision generally, and specifically to

review a legislature's enactments regarding criminal punishment. In Ralph, the State of Maryland argued that capital punishment was a legislative decision with which the judiciary should not interfere. The Fourth Circuit rejected the State's argument, noting: "The fact that a Maryland statute authorizes capital punishment . . . does not conclusively establish the punishment's constitutionality, for the Eighth Amendment is a limitation on both legislative and judicial action." Id. at 788-89 (citing Robinson v. California, 370 U.S. 660 (1962)).

Second, to the extent that the New York courts were willing to consider evidence on the issue, Kemmler would have been required to prove "beyond doubt"

that death by electrocution was cruel and unusual in order to obtain relief. Kemmler, 136 U.S. at 442. However, in today's jurisprudence, courts apply a preponderance of the evidence standard for establishing an Eighth Amendment violation.[14] The constitutionality of execution by electrocution must be examined using a preponderance of the evidence standard.

Finally, scientific and medical knowledge and technology have made great strides since 1890. This Court has recognized that the Eighth Amendment is not a static concept but "must draw its meaning from the evolving standards of

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[14]See Blake v. Hall, 668 F.2d 52, 57-58 (1st Cir. 1981), cert. denied, 456 U.S. 983 (1982); Martin v. Foti, 561 F. Supp. 252, 257 (E.D. La. 1983).

decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958); Ralph v. Warden, 438 F.2d 786, 790-91 (4th Cir. 1971). Furthermore, it has recognized that what is cruel and unusual "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." Gregg v. Georgia, 428 U.S. 153, 171 (1976) (quoting Weems v. U.S., 217 U.S. 349, 378 (1910)). In determining whether public opinion has changed, courts are not to impose their own "subjective judgment" but "look to objective indicia that reflect the public attitude toward a given sanction." Gregg, 428 U.S. at 173.

By consulting with experts in the advanced and progressing fields of

medicine and science, and through the discovery requests pursued in the course of his underlying litigation in the District Court, as well as by reviewing the changes other states are making with respect to capital punishment, Poyner has attempted to develop such "objective indicia" so that a modern judge, by examining modern technological evidence and applying modern legal standards, may reconsider the long-standing assumption that electrocution is not cruel and unusual. Poyner is trying to bring electrocution, and scrutiny thereof, into the twentieth century and into step with modern medical science and the "evolving standards of decency."

This Court in Brown v. Board of Education, 347 U.S. 483 (1954),

demonstrated that courts can, and often should, re-evaluate ancient precedents like Kemmler. In Brown, this Court refused to bind the nation and the federal judiciary to the outdated finding of Plessy v. Ferguson, 163 U.S. 537 (1896), that separate facilities for blacks and whites could be equal and were therefore constitutional. Instead the Court reexamined the issue of public school segregation in the context of contemporary circumstances and new revelations in the fields of sociology and psychology, stating:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Brown, 347 U.S. at 492-93. The Court looked to the psychological and sociological studies of Kenneth Clark and others, and held that "[t]o separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Id. at 494 and n.11. This Court recognized that "[w]hatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority." Id. In Furman v.

Georgia, 498 U.S. 238, 285 (1972), the Court acknowledged the necessity to revisit timeworn assumptions when it stated that "past assumptions . . . are not sufficient to limit the scope of an examination of [the death penalty] today."

Poyner's Complaint in the District Court and Petition for writ of certiorari filed here, asks this Court to follow the path it took in Brown v. Board of Education. It asks the Court to reexamine the constitutionality of execution by electrocution in light of modern medicine and science and to free itself of the constraints imposed by findings of fact made over one hundred years ago when our understanding of the human central nervous system, the brain,

and the properties of electricity were primitive.

The District Court below, by examining modern technological evidence and applying today's legal standards, was prepared to reconsider the long-standing and obsolete assumption that electrocution is immune from constitutional review, but the Fourth Circuit extinguished the District Court's opportunity, ruling without allowing for the presentation of contrary evidence. Nevertheless, the constitutionality of electrocution is not, and cannot be, a closed debate given that the first, last, and only court to consider evidence of the effects of electrocution did so in the 19th century. Moreover, the Commonwealth of Virginia's recent changes

in its appliances and procedures dictate at least a hearing in some court to review the effects of those changes.

With the help of knowledgeable experts, Poyner is prepared to prove what modern science now knows about electrocution. This knowledge includes, for example, the excruciating pain suffered by the inmate as he actually burns and cooks during the electrocution process. In 1890, before the first execution by electrocution, the "experts" were unaware of this phenomenon. It was also presumed that the inmate was instantly unconscious as the electricity was applied, but Poyner's experts have exposed the fallacy of this assumption. Our understanding of electricity was in its infancy in late 19th century, and

medical science has advanced exponentially over 100 years. The time has come to analyze the constitutionality of Virginia's electric chair using this modern body of knowledge.

On February 11, 1993, the Circuit Court for Loudoun County agreed with Poyner's position and held that a Virginia court ought to hear evidence on this very issue:

> [L]ooking at all the Virginia cases that were cited to me . . . there's just, for some reason, some sort of a blind adherence to this rule that came up from the decision of the U.S. Supreme Court back in 1890, that it's not cruel and unusual punishment for execution by electrocution; and that that decision was made without any real findings of fact, without any real factual basis to support it.
>
> And it just seems to me that we are a country, we pride ourselves in our Constitution, both our U.S. Constitution, our State's Constitution, Virginia's Constitution, as being a

> **viable working document that is supposed to work with society as society's attitudes change over periods of time.**
>
> **And certainly science and technology has advanced an awful lot since 1890. And I feel somewhere a Court has got to hear the evidence of what the state of the art is now on the effect of electricity on the human body during the course of execution by electrocution in Virginia.**

Transcript, Commonwealth v. White, Circuit Court for Loudoun County, Crim. No. 8129 (February 11, 1993), at 4. (A82-A91). Thus, a Virginia court has now ruled that an evidentiary hearing is necessary and appropriate to determine whether execution by electrocution in Virginia violates the state and federal constitutional prohibitions on cruel and unusual punishments.

Kemmler is the decision on which all cases upholding electrocution as a

constitutionally sound means of execution rely. If that decision is determined to be flawed based on outdated factual determinations or legal principles, then all of its progeny must likewise fall. Poyner should be entitled to an evidentiary hearing to present evidence that the factual and legal bases supporting the Kemmler decision are outdated.

X.

PRAYER FOR RELIEF

For the reasons stated, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alexander H. Slaughter, hereby certify that I caused three (3) copies of the foregoing Petition for Writ of Certiorari to be delivered by hand on this 11th day of March, 1993 to John H. McLees, Esquire, Assistant Attorney General, Office of the Attorney General, 101 North 8th Street, Richmond, Virginia 23219, counsel of record for appellant below.

Alexander H. Slaughter
Counsel of Record

APPENDIX

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FILED 12/10/92

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SYVASKY L. POYNER, on behalf of himself and all others similarly situated, Plaintiffs, v. EDWARD W. MURRAY, Director, Virginia Department of Corrections, Serve On: Edward W. Murray, Director Virginia Department of Corrections 6900 Atmore Road Richmond, Virginia 23225; ELLIS B. WRIGHT, JR., Warden, Greensville Correctional Center, Serve On: Ellis B. Wright, Jr., Warden Greensville Correctional Center 901 Corrections Way Jarratt, Virginia 22387; and JOHN DOE, Executioner, Defendants.	)	CIVIL ACTION NO. 3:92 CV815

COMPLAINT

Syvasky L. Poyner, on behalf of himself and all others similarly situated, by counsel, for his Complaint seeking permanent injunctive and declaratory relief against Edward W. Murray, Director of Virginia Department of Corrections; Ellis B. Wright, Jr., Warden, Greensville Correctional Center; and John Doe, Executioner, states as follows:

I. PRELIMINARY STATEMENT

1. This is a class action filed by plaintiff, on behalf of himself and all other persons similarly situated both now and in the future, pursuant to 42 U.S.C. § 1983, seeking permanent injunctive and declaratory relief with respect to the unconstitutional procedure and means utilized by the defendants and prescribed

by the law of the Commonwealth for executing prisoners in Virginia.

2. Plaintiff in this action seeks to enjoin the deprivation by defendants, under the color of law, of rights of plaintiff and all other persons similarly situated protected by the Eighth and Fourteenth Amendments to the Constitution of the United States, and petitions the Court for an order declaring unconstitutional acts of defendants and Va. Code § 53.1-233 establishing electrocution as the means of carrying out capital punishment in the Commonwealth.

II. JURISDICTION AND VENUE

3. This Court has jurisdiction of this civil action under both:

(a) 28 U.S.C. § 1331, in that this action arises under the United States

Constitution, particularly the provisions of the Eight and Fourteenth Amendments; and

(b) 28 U.S.C. § 1343(3), in that this is an action brought to redress deprivations, under color of state law, of rights, privileges and immunities secured to the plaintiff and similarly situated persons by the Constitution of the United States of America.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the claims arose in this district in that executions by electrocution are carried out at the Greensville Correctional Center in Greensville, Virginia.

III. PARTIES

5. Plaintiff Syvasky L. Poyner is an inmate currently incarcerated at the Mecklenberg Correctional Center in

Boydton, Virginia. He is subject to five death sentences imposed by three circuit courts of the State of Virginia. No date has been fixed for his execution. However, pursuant to Va. Code § 53.1-232, his date of execution could be set at any time.

6. At all times relevant to this suit, defendant Edward W. Murray has been the Director of the Virginia Department of Corrections. He has acted and will act in such capacity as the agent, servant, and employee of the Commonwealth of Virginia in all actions he has taken and will take in deprivation of plaintiff's constitutional rights. He is sued individually and in his official capacity.

7. At all times relevant to this suit, defendant Ellis B. Wright, Jr., has

been the Warden of Greensville Correctional Center. He has acted and will act in such capacity as the agent, servant, and employee of the Commonwealth of Virginia in all actions he has taken and will take in deprivation of plaintiff's constitutional rights. He is sued individually and in his official capacity.

8. At all times relevant to this suit, defendant John Doe, an Executioner whose identity is not known to plaintiff, has been an employee of the Department of Corrections of Virginia. He has acted and will act in such capacity as the agent, servant, and employee of the Commonwealth of Virginia in all actions he has taken and will take in deprivation of plaintiff's constitutional rights. He

is sued individually and in his official capacity.

IV. CLASS ACTION

9. Plaintiff herein brings this action on behalf of himself and all other persons similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure. Plaintiff represents the class of all persons who have been or will be sentenced to die in Virginia's electric chair, currently located at the Greensville Correctional Center in Greensville, Virginia.

10. Joinder of all class members is impracticable because the proposed class is potentially too numerous; in addition, the class encompasses unknown future, as well as known present, prisoners facing execution by electrocution. Although the class consists of an indefinite and

uncertain number of members, identifying members is practicable because as death sentences are imposed, the identity of new class members will become known.

11. The allegations set out herein present questions of law and fact which are common to the class.

12. Plaintiff Poyner has standing to challenge Virginia's method of execution. His claim is typical of those of the unnamed members of the class.

13. Plaintiff Poyner has as much at stake in the outcome of this case as the unnamed members. He is represented by the law firms of Hunton & Williams and McGuire, Woods, Battle & Boothe. Poyner thus can adequately represent the interests of the class.

14. Since plaintiff seeks injunctive and declaratory relief against

the unconstitutional practices of the defendants in executing prisoners sentenced to death in Virginia by electrocution, class certification is proper pursuant to Rule 23 of the Federal Rules of Civil Procedure.

V. FACTUAL ALLEGATIONS

Count I

15. The Commonwealth of Virginia uses electrocution as its method of execution. Electrocution involves passing electrical current through the human body until the condemned person is dead. Electrocution was heralded as providing an instantaneous and hence humane and painless death when invented in the late nineteenth century, but modern medical and scientific evidence demonstrates that it provides neither. Execution by electrocution results in the

wanton and unnecessary infliction of pain: death by electrocution is tantamount to being burned or cooked alive.

16. The amount of electrical current (measured in amperes or amps) applied to the condemned person depends on the amount of voltage generated and the resistance (measured in ohms) offered by his body. This follows from Ohm's law that voltage equals current multiplied by resistance, a corollary of which is that current equals voltage divided by resistance.

17. In general, if the voltage applied to a resistor is too great, the latter will burn out or explode.

18. The objective of the Commonwealth in electrocuting the condemned person is to kill him without

causing his body to explode and without allowing the witnesses to see indicia of suffering on his part.

19. The defendants and the Commonwealth strap the condemned person into the chair at the arms, the trunk, and the legs. A mask is placed over his face so that the witnesses will not see the effects of the current reflected upon it. Moreover, the Commonwealth equips him with a diaper to prevent the witnesses from becoming aware of the effects of the electrical charge on his bladder and bowels.

20. The defendants and the Commonwealth apply one electrode to the condemned person's head, which has been shaved. Between the head and the electrode, the defendants and the Commonwealth place a sponge soaked in a

briny solution. The electrode is to pass current against the scalp of the subject, the sponge is to secure the contact and theoretically to alleviate burning of the scalp, and the brine is to improve the conductivity of the sponge.

21. A second electrode (with brine-soaked sponge) is placed on one of the subject's legs.

22. The defendants and the Commonwealth must recognize that the continuous and repeated application of electricity to a conscious human body is extremely painful, and that to apply electricity in such a manner intentionally would constitute cruel and unusual punishment within the meaning of the Eighth Amendment.

23. Therefore, the avowed objective of the defendants and the Commonwealth is

to pass sufficient current through the body and brain of the condemned person to render him brain dead or at least instantaneously unconscious without unduly disfiguring the body.

24. However, no one knows the amount of voltage needed to render the condemned person instantaneously unconscious, and the law of the Commonwealth leaves it up to the Director or his designee to determine how much voltage to use. It provides him with no guidelines in this respect.

25. No testing is done to determine the resistance of the body of the person to be electrocuted. Hence, the Director or his designee must guess at the amount of voltage to apply to the condemned person.

26. The human skull is a very poor conductor of electricity. Human skin is also a poor conductor, but sweat on the outside of the skin is an excellent conductor, given that it is essentially salty water.

27. Most, if not all persons strapped into the electric chair awaiting execution, sweat.

28. Electrical current seeks the path of least resistance. Therefore, a far greater portion of electrical current passes along the prisoner's skin than through his skull, body and brain as it travels to the electrode on his leg.

29. Hence, in spite of the voltage applied, relatively little current goes through the prisoner's brain.

30. The effect is to burn the condemned person's skin at extreme

temperatures while he is awake and conscious for an indeterminate period. Copies of photographs of the body of Robert Wayne Williams, executed in Louisiana, attached hereto as Exhibit 1, provide some understanding of the burns that can be inflicted by the electric chair. These photographs are still filed with the Court as exhibits in Bassette v. Commonwealth of Virginia, et al., Civil No. 3:92CV11.

31. The heat generated by the passage of current across the body eventually brings the blood to a boil and results in the brain being cooked.

32. The prisoner ultimately dies from asphyxia and cardiac arrest.

33. Sufficient current can be applied to a human being to kill him instantaneously. However, the amount of

current would be so great that the body would be very badly burnt and might well explode.

34. The Director or his designee therefore essentially guesses at the voltage that should be applied to kill the condemned person without creating a mess. Generally, the Director or his designee errs on the side of avoiding the latter.

35. The pain experienced by the condemned person is evidenced by:

(a) third-degree burns to the flesh;

(b) drooling and vomiting;

(c) defecation and urination;

(d) convulsions;

(e) grimaces and dilated pupils.

36. The painful effects of electrocution described above are

concealed from the spectators by the mask, diaper and restraints on the prisoner.

37. Because the nervous and motor systems of the body are separate, the muscles can be rendered immobile while the nervous system retains its ability to register pain. During the application of electricity, the condemned person's nervous system and brain remain relatively intact, allowing him to feel pain. His muscles, however, are fully contracted by the electrical shock. The involuntary contraction of the condemned person's muscles itself causes intense pain. After he lurches forward with the initial jolt of electricity (a phenomenon almost invariably noted by witnesses), he cannot move but can still feel the indescribable pain inflicted by the

electrical current traveling over and through his body.

WHEREFORE, plaintiff on behalf of himself and the class prays that the Court: (1) declare Va. Code Section 53.1-233 and the actions of the defendants unconstitutional in violation of the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment; and (2) enjoin the defendants from using electrocution as a method of carrying out death sentences.

Count II

38. The plaintiff alleges paragraphs 1 through 37 of Count I as it set out fully herein.

39. The defendants and the Commonwealth are deliberately indifferent to the fact that they are torturing the Commonwealth's condemned prisoners, as

they are aware or must be deemed to be aware of the facts set forth herein and have not even attempted to alleviate the resulting problems.

40. The technology of executing people by administering jolts of electricity externally to the head is antiquated. The defendants and the Commonwealth are aware of a large number of botched executions, both within and without Virginia.

41. The defendants and the Commonwealth are aware that the use of Virginia's chair has resulted in several gruesome executions. Flame and smoke erupted from the head of Frank J. Coppola when he was executed. More recently the executions of Wilbert Lee Evans and Derick L. Peterson were botched. Both men died prolonged, lingering, agonizing

deaths, as observed by eyewitnesses and reflected by the physical evidence. Blood and other bodily fluids gushed out from under Evans' mask during his execution, and his autopsy revealed burns not only at the points of the electrode contact, but on other parts of his body as well. Peterson was not killed by the first jolt of electricity, and witnesses observed him wheezing and moaning. It took the defendants and the Commonwealth over twelve minutes to execute Peterson.

42. In response to the botched execution of Peterson in August 1991, the defendants and the Commonwealth decided that in all future executions they would administer two separate two-minute series of electrical jolts. The defendants and the Commonwealth adopted this procedure because they recognized that the first

jolt of electricity often does not kill a condemned person and that death by electrocution is not immediate.

43. Moreover, the defendants and the Commonwealth do not know and cannot demonstrate that the condemned person is even rendered unconscious by the first jolt of electricity. Rather, modern medical and scientific evidence establishes that the condemned person is conscious and able to feel pain during the application of electrical current to his body.

44. Virginia's operating and testing procedures for its equipment are primitive. The operating procedures promulgated by the Department of Corrections provide that the brine solution in which the sponges are soaked shall consist of five gallons of water

and "approximately three (3) pounds of table salt." Commonwealth of Virginia Department of Corrections, Greensville Correctional Center, Institute Operating Procedures, IOP No. 426.1-7.4 April 1, 1991; see Exhibit 2. In order to determine whether the brine is sufficiently saline, the defendants and the Commonwealth place "a fresh egg in its shell in the solution. If the egg will float, the solution is correct." IOP No. 426.1-7.4, see Exhibit 2. The type of egg is presumably left to the discretion of the individual doing the testing. The testing of the saline solution could be done with a relatively cheap conductivity meter, which would presumably be more accurate than the floating "fresh egg" test.

45. The Commonwealth in the past has failed to provide requested information on the composition of the execution teams, and hence, the expertise of those persons cannot be gauged. However, a review of the relevant parts of the Institutional Operating Procedures (No. 426.1) reveals that no special expertise is required of its members. Moreover, the relevant part of the Institutional Operating Procedures (No. 426.1) does not (a) instruct on the handling of electrical malfunctions during the operation of the electric chair, (b) instruct on the proper placement of the electrodes, (c) provide for identification of any condition of the prisoner which might retard the flow of electric current or for the performance of calculations designed to

assure that the voltage used is sufficient to render the subject unconscious immediately, if that is possible.

46. The defendants and the Commonwealth have consistently misled the public and its legislature respecting the painful nature of electrocution, the antiquated technology applied, the primitive procedures used to test and administer the machinery, the failure to use personnel qualified by education or training to carry off the executions, the number of botched executions and the certainty of pain.

WHEREFORE, plaintiff on behalf of himself and the class prays that the Court: (1) declare Va. Code § 53.1-233 and the actions of the defendants unconstitutional in violation of the

Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment; and (2) enjoin the defendants from using electrocution as a method of carrying out death sentences.

SYVASKY L. POYNER
on behalf of himself and
all others similarly
situated

By /s/ Alexander H. Slaughter
Of Counsel

Alexander H. Slaughter
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EXHIBIT
1

January 6, 1992

Mr. Stuart A. Raphael
Hunton & Williams
Post Office Box 1147
Fairfax, Virginia 22030

Dear Mr. Raphael:

This is in response to your letter of December 31, 1991, renewing your request pursuant to the Freedom of Information Act (FOIA), for photographs, diagrams, engineering drawing, electrical schematics and/or blueprints of the death chamber or electric chair. You further request the Institutional Operating Procedures (IOP) on execution. These records and documents, you contend, are not exempted by Section 2.1-342(B)(32).

You state that it is difficult to conceive how photographs and electrical schematics of the electric chair itself would jeopardize the security of the facility at Greensville. Those documents, in the hands of a person with the appropriate knowledge, could be used to sabotage the operation and lead to a potential escape. Further, the location of the electrical conduits could lead to sabotage by persons within the prison or on the outside of the facility.

We will continue to object to the release of schematics, diagrams, etc., of the Greensville facility under Section 2.1-

EXHIBIT 2

342(B)(32). We will, however, enclose the diagrams and schematics of the facility at the Virginia State Penitentiary. Since that facility is no longer in existence and the electronics of the unit have now been totally changed, they now present no security threat. I note that your original request #8 requested diagrams, etc., of <u>the</u> death chamber or electric chair, this request was read to mean the current death chamber.

While your letter is aimed at items 8-11 of your November 27, 1991, FOIA inquiry, you seem to further question the withholding of IOPs on executions. While you have not asked for those IOPs in your most recent correspondence, we have decided to furnish you with them without your formal request. We have, however, redacted certain sections of those documents pursuant to Section 2.1-342(A)(3). The reasons for individual redactions will be explained as to each particular document.

Institutional Operating Procedure 426 relates to the procedures for carrying out death sentences. We have made the following redactions to this document:

426-7.3 -	(Last sentence) - Explains where records of the inmate will be held.
426-6.2 -	Explains security in the confinement area.

426-6.4(1) - Explains where the security team will muster.

(5)(b) - Explains security procedures for witnesses.

(5)(d) - Explains security responsibility for enforcing instructions.

426-6.7 - Explains where the institutional records of condemned will be maintained.

Institutional Operating Procedure 426.1 relates to the duties and responsibilities of the execution team. We have made the following redactions to this document:

426.1-7.0 - Explains the make-up and numbers of the execution team.

426.1-7.5(1) - Explains the duty and number of personnel in relation to the execution.

(2) - Explains the time and place for muster of personnel.

(16) - Explains who activates the cycle on the electric chair.

You should note that #18 calls for a two (2) minute cycle. This procedure is

being changed to a ninety (90) second cycle for the next execution.

Institutional Operating Procedure 426.2 relates to the duties and responsibilities of the death watch person(s). We have made the following redactions to this document:

426.2.7.2(2) - Explains the duties and movement of the death watch team.

426.2.7.2(4) - Explains certain duties of the death watch team.

(9) - Explains movement and location of inmate.

(12) - Explains the duty schedule and personnel requirements of the death watch team.

Taken together these three IOPs make up the procedure for carrying out an execution. The redactions have been made pursuant to Section 2.1-342(B)(32). The number of personnel, their location and their particular duties relate directly to security. Providing these facts would jeopardize the security of the institution by providing information that could be used in an escape attempt or to disrupt the institution. As you know, six inmates escaped from the death row at Mecklenburg Correction Center even though

they had none of this information. The Department of Corrections, in keeping with its responsibility to the citizens of the Commonwealth, must take every step possible to prevent a recurrence of that event.

Institutional Operating Procedures 426, 426.1 and 426.2 existed for the Virginia State Penitentiary. Those IOPs were updated when the facility moved to Greensville but present the same information. They have not been provided because of duplication of effort, as the same paragraphs would be redacted.

I trust this further material satisfies your request. While we have made every effort to provide as much information as possible to you within the parameter of the FOIA, I am sure you will agree that the security of the facility is paramount.

Please feel free to contact me, if I can be of further assistance.

Sincerely,

/s/ Edward W. Murray

Edward W. Murray

EWM:gcg

PART II

PROCEDURES

426-7.0 PROCEDURES

426-7.1 Place of Confinement

1. Persons for whom the death sentence has been pronounced, shall be conveyed to the Greensville Correctional Center, or to other confinement facilities by Police agencies having jurisdiction of the court where sentence was handed down.

2. Upon arrival at the confinement facilities, the inmate will be strip-searched and issued a complete issue of clothing allowed in the cell. (See post orders for clothing and articles allowed.)

3. Upon completion of the requirements in 2 above, the inmate will be confined in an individual cell. Only one (1) inmate may be confined in each cell.

4. The institution's I.D. Officer will go to place of confinement, photograph and fingerprint the inmate upon instructions from the Warden, or his designee. [Redacted].

426-6.2 Security Within the Confinement Area

1. [Redacted].
2. [Redacted].
3. [Redacted].

426-6.3 Maintenance of Death Chamber

1. The maintenance of the Death Chamber and appliances for the execution of felons will be the responsibility of the Officer-in-Charge of the Execution Team. (See I.O.P. #426.1).

2. The general maintenance of the housing unit will be coordinated through the institution maintenance section.

426-6.4 Selection, Composition and Training of the Execution Team

1. [Redacted].

2. The Execution Team members shall be selected from

Division of Adult Institutional Services' employees.

3. The Warden of Greensville Correctional Center will have the responsibility for making the final decision.

4. The criteria for selection of Team members will be based on job specification.

5. The training of the Execution Team shall be the responsibility of the Officer-in-Charge of the Team.

426-6.5 Correspondence and Notification Requirements

1. Thirty (30) days prior to the scheduled execution, the Warden shall prepare for the Department of Corrections Director's signature, a letter to the Governor and the Attorney General of the Commonwealth informing them:

   a. The location of the inmate prior to 30 days of the execution date and a follow-up

letter at 15 days, or when the inmate is received at Greensville.

b. The date set by the court for the inmate's execution.

c. The execution will take place as scheduled <u>unless</u> directed otherwise by a competent Judicial or Executive authority.

2. Four (4) days before the scheduled execution, the Warden of Greensville Correctional Center shall notify the following persons of the <u>inmate's name</u> and <u>number</u> and the <u>date</u> and <u>time</u> scheduled for the execution:

a. The Director of the Department Corrections.

b. The Deputy Director of Adult Institutional Services.

c. The Regional Administrator of Region IV (Eastern).

d. The Chief Physician of the Department of Corrections.

e. The Manager, Classification and Records Unit.

f. The Bureau of Public Information.

g. The Assistant Attorney General assigned to the Department of Corrections.

h. The Execution Team.

i. The Sheriff, Greensville County.

j. Superintendent, State Police.

k. The witnesses selected for the execution.

3. The day before the execution:

a. The Execution Team will carry out its responsibilities and make an oral report to the Warden of the state of readiness. (See I.O.P. #426.1

for details of preparation.)

b. The Security Staff of Greensville Correctional Center will be briefed on security requirements on execution day by the Chief of Security and/or Warden.

426-6.6 Requirements on the Day of Execution

1. The Warden will be briefed and he will assign the Death Watch Team 24 hours before time set for the execution. (See I.O.P. #426.2 for Duties of Death Watch Team.)

2. [Redacted] stand-by requirement will begin 12 hours before the scheduled execution and remain on stand-by until dismissed by the Warden, or his designee.

3. A representative of the Virginia State Police will be located in the Warden's office, if the Administration feels there is a need. The reporting time and duration of this

requirement to be announced.

4. Representatives of the news media shall be assembled in a pre-designated location under the direction of the Greensville Correctional Center Public Information Officer.

5. The Warden, or his designee, will receive and brief the witnesses upon their arrival at Greensville Correctional Center.

a. They are to be properly identified to insure that only authorized persons witness the execution and require them to sign required documents.

b. [Redacted].

c. Witnesses will be escorted to the witness booth by the Warden, or his designee, 15 minutes before the time of the execution.

d. [Redacted].

426-6.7 Records and Reports

1. [Redacted].

2. All log books maintained on each inmate housed in the Execution Chamber, or other location, shall be turned in to the Warden's office when there is a need for the books to be replaced and/or after the death sentence has been carried out.

PART III

ADMINISTRATION

426-7.1 OFFICE OF PRIMARY RESPONSIBILITY

The Warden of Greensville Correctional Center shall hold primary responsibility for maintaining a permanent Death Chamber within the confines of Greensville Correctional Center and coordinating the execution of condemned inmates.

426-7.2 SUPERSESSION

This is the first issue of this Institutional Operating Procedure.

426-7.3 REFERENCES

Code of Virginia, Sections 53.1-232 to 53.1-236

426-7.4 REVIEW DATE

This Institutional Operating Procedure shall be reviewed and revised accordingly by October 1, 1991.

/s/ E. M. Grizzard
E. M. Grizzard
Warden

6-14-91
Date

J. A. Smith, Jr.
Regional
Administrator

Date

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF CORRECTIONS

GREENSVILLE CORRECTION CENTER

INSTITUTIONAL OPERATING PROCEDURES

IOP NUMBER: 426.1 DATE: April 1, 1991

PAGE 1 OF 5 PAGES

SUBJECT: Duties and Responsibilities of the Execution Team

PART I

GENERAL PROVISIONS

426.1-1.0 PURPOSE

This will prescribe the duties and responsibilities of the Execution Team Members in carrying out the Death Sentence.

426.1-2.0 AUTHORITY

Code of Virginia, Section 53.1-232 to 53.1-236.

426.1-3.0 EFFECTIVE DATE

April 1, 1991

426.1-4.0 DISCUSSION

426.1-5.0 APPLICABILITY

This Operating Procedure applies to all members of the Execution Team.

426.1-6.0 DEFINITIONS

None

PART II

PROCEDURES

426.1-7.0 PROCEDURES

426.1-7.1 EXECUTION TEAM COMPOSITION

[Redacted].

426.1-7.2 TRAINING

The Officer-in-Charge and/or the Assistant Officer-in-Charge shall conduct a training session at least once each month at which time all appliances and electrical circuits will be tested.

426.1-7.3 The four (4) days before a scheduled execution, the Officer-in-Charge and/or his assistant will assemble the Execution Team in the Death Chamber area to prepare and test all appliances and equipment for the scheduled execution.

426.1-7.4 The day before a scheduled execution the following preparations will be made:

1. Set up the cooling board in room provided for same.

2. Insure that a minimum of ten (10) sandbags, filled with sand, are available in the cooling room.

3. Obtain two (2) clean bed sheets and six (6) clean hand towels and store in room with cooling board.

4. Soak head piece and leg pieces in clear cold water for at least three (3) hours before being removed and place in brine solution.

5. Mix five (5) gallons of water and approximately three (3) pounds of table salt to form brine.

6. Check the solution by placing a fresh egg in its shell in the solution. If the egg will float, the solution is correct.

7. Insure that 12 non-cushioned straight back chairs are placed in the witness room.

8. Upon completion of the preparation stage, the Officer-in-Charge and/or the Assistant Officer-in-Charge will make an oral report to the Warden as to the state of readiness of equipment, appliances and Death Chamber.

426.1-7.5 Prior to, but not more than 24 hours before the day of execution, the Execution Team will carry out the following instructions under the direction of the Officer-in-Charge and/or the Assistant Officer-in-Charge:

1. [Redacted].

2. [Redacted].

3. Insure that all equipment is properly placed.

4. The Officer-in-Charge and/or Assistant Officer-in-Charge will set the test board on the chair and test circuitry. The test board will be left on the chair upon completion of first circuitry test.

5. The two (2) members assigned to the head and leg pieces are to remove same from the clear water,

squeeze excess water from them and place the head and leg pieces in the brine solution and add ice, one and a half hours (1 1/2 hours) prior to the execution.

6. Fifteen minutes before the scheduled execution, the designee will activate the telephone. He/she will call the number where the Governor is located, get an assistant assigned by the Governor on the phone and keep the line open until the execution is over.

7. The Officer-in-Charge will retire to the controls after ascertaining all is in order for carrying out the execution.

8. After the witnesses are seated, circuitry is tested by the Assistant Officer-in-Charge. Upon completion of the test, the test board will be removed and stored in controls.

9. The two (2) Team members assigned to the head and leg pieces will remove same from brine, squeeze

out excess liquid and place on drain board on orders of the Assistant Officer-in-Charge.

10. The Warden, or his designee, will read the Court Order to the inmate and ask if he has any last words.

11. The three (3) Team members assigned the duties of escorting the condemned inmate to the chair will do so upon instructions from the Assistant Officer-in-Charge.

12. The inmate will be escorted to the chair, strapped in the chair, head and leg pieces and face mask secured by Team members previously assigned those duties, under the direction of the Assistant Officer-in-Charge.

13. When all straps and appliances are secured, all members of the Team will dry their hands and retire to post where the safety key is located.

14. The designee on the phone, in contact with the

Governor's assistant, will give the all clear signal to the Warden possessing the key for the circuitry.

15. Upon receipt of the all clear signal, the key will be inserted by the Warden, activate the circuitry and signal to the Officer-in-Charge to proceed.

16. [Redacted].

17. When the cycle has been completed, the Officer-in-Charge will signal to the Warden who will deactivate the circuitry and remove the key.

18. After the key has been removed, the Warden will wait <u>two (2) minutes</u> then signal the physician in attendance.

19. After the physician pronounces the inmate dead, the Warden will inform the Director that the sentence has been carried out.

20. After the physician pronounces the inmate dead, the witnesses will be escorted out by the Warden, or his designee.

21. The body will be removed by the Execution Team and placed on a sheet on the cooling board. The body will be covered with the second sheet and sand bags placed on thighs, knees and arms.

22. The body will be removed from Greensville Correctional Center when instructed to do so by the Warden. The body will be transported to the State Morgue for further disposition.

23. The Execution Team, under the direction of the Officer-in-Charge, will store all equipment in the proper location, secure the Death Chamber and report to the Warden's office for additional instructions.

<u>PART III</u>

<u>ADMINISTRATION</u>

426.1-8.1 <u>OFFICE OF PRIMARY RESPONSIBILITY</u>

The Officer-in-Charge and/or the Assistant Officer-in-Charge will be responsible to the Warden of Greensville

Correctional Center for the care and maintenance of the Death Chamber and all appliances and equipment; the training of the Execution Team and carrying out the execution of the condemned inmate.

426.1-8.2 SUPERSESSION

This is the first issue of this Institutional Operating Procedure.

426.1-8.3 REFERENCES

Code of Virginia, Section 53.1-232 to 53.1-236.

426.1-8.4 REVIEW DATE

This Institutional Operating Procedure shall be reviewed and revised accordingly by October 1, 1991.

/s/ E. M. Grizzard	_____
E. M. Grizzard	J. A. Smith, Jr.
Warden	Regional Administrator
6-14-91	_____
Date	Date

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF CORRECTIONS

GREENSVILLE CORRECTION CENTER

INSTITUTIONAL OPERATING PROCEDURES

IOP NUMBER: 426.2 DATE: April 1, 1991

PAGE 1 OF 4 PAGES

SUBJECT: Duties and Responsibilities of the Death Watch Person(s)

PART I

GENERAL PROVISIONS

426.2-1.0 PURPOSE

This will prescribe the duties and responsibilities of the person(s) assigned to the Death Watch Duties.

426.2-2.0 AUTHORITY

Code of Virginia, Section 53.1-232 to 53.1-236

426.2-3.0 EFFECTIVE DATE

April 1, 1991

426.2-4.0 DISCUSSION

426.2-5.0 APPLICABILITY

This Institutional Operating Procedure applies to those members of the Execution Team designated to perform Death Watch duties.

426.2-6.0 DEFINITIONS

None

PART II

PROCEDURES

426.2-7.0 PROCEDURES

426.2-7.1 DEATH WATCH COMPOSITION

[Redacted]

426.2-7.2 DUTIES AND RESPONSIBILITIES

1. Report to the Warden 24 hours before the time set for the execution.

2. [Redacted]

3. Communicate request for religious counseling, medical needs, telephone use, visits, etc. to the Warden or his designee for decision.

4. [Redacted]

5. Place a clean change of bed linen (2 sheets and pillow case), change of underwear, trousers and shirt.

6. Take the last meal menu request from the inmate and submit the request to the Warden or his designee.

7. Serve the last meal to the inmate about four (4) hours before the scheduled execution.

8. Upon completion of the serving of the meal, remove the inmate from the assigned cell and shave his head with clippers.

9. [Redacted]

10. Upon completion of requirement outlined above, make an oral report to the Warden.

11. One (1) member of the Death Watch may retire at this time.

12. [Redacted]

426.2-7.2 GENERAL DUTIES AND RESPONSIBILITIES

1. The Death Watch member on duty will position himself where he has constant observation of the inmate.

2. In the event the inmate attempts to harm himself, the Death Watch Member on duty will alert the regular officer on duty and take whatever action is necessary to correct the situation.

3. Prepare and submit a written report in detail to the Warden at the conclusion of the Death Watch mission.

4. Contact the Warden or his designee in any situation not covered by written or oral instruction.

PART III

ADMINISTRATION

426.2-8.1 OFFICE OF PRIMARY RESPONSIBILITY

The Death Watch person(s) will be responsible to the Warden of Greensville Correctional Center for the security and protection of the condemned inmate from harming himself or harm from

other person(s), serving of the last meal, communicating with the Warden on the last request of the inmate and supervision of preparing the inmate for the execution.

426.2-8.2 SUPERSESSION

This is the first issue of this Institutional Operating Procedure.

426.2-8.3 REFERENCES

Code of Virginia, Section 53.1-232 to 53.1-236

426.2-8.4 REVIEW DATE

This Institutional Operating Procedure shall be reviewed and revised accordingly by October 1, 1991.

E.M. Grizzard Warden	J. A. Smith, Jr. Regional Administrator
Date	Date

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

SYVASKY L. POYNER, on behalf of himself and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No. 92CV815
EDWARD W. MURRAY, Director, Virginia Department of Corrections, ELLIS B. WRIGHT, JR., Warden, Greensville Correction Center, and JOHN DOE, Executioner,	)	
Defendants.	)	

ORDER

For the reasons stated in the accompanying Memorandum, and deeming it just and proper so to do, it is Adjudged and Ordered that the Plaintiff's motion for expedited discovery and his motion to compel are hereby GRANTED, except as they pertain to the request to videotape the

execution of Charles Stamper, which portion of said motion is hereby DENIED.

Let the Clerk send copies of this Order and the accompanying Memorandum to all counsel of record.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

1/19/93
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

SYVASKY L. POYNER, on behalf of himself and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No. 92CV815
EDWARD W. MURRAY, Director, Virginia Department of Corrections, ELLIS B. WRIGHT, JR., Warden, Greensville Correction Center, and JOHN DOE, Executioner,	)	
Defendants.	)	

MEMORANDUM

This matter is before the Court on the Plaintiff's motion for expedited discovery and the Defendant's related motion for a protective order pending a ruling on their motion to dismiss. The Plaintiff makes three separate and

independent discovery requests, all related to the execution of Charles S. Stamper, currently scheduled to take place on January 19, 1993. The parties argued their respective discovery motions before this Court on January 15, 1993.

On December 10, 1992, Mr. Poyner, on behalf of himself and all others similarly situated, filed a Complaint in this Court against Edward W. Murray, Director, Virginia Department of Corrections, Ellis B. Wright, Jr., Warden, Greensville Correctional Center, and John Doe, Executioner, seeking permanent injunctive and declarative relief pursuant to 42 U.S.C. § 1983 with respect to the alleged unconstitutional procedure and means utilized by the Defendants and prescribed by the law of the Commonwealth of Virginia for executing prisoners in Virginia. On

December 10, 1992, this Court Ordered the Defendants to allow a representative of the Plaintiff to enter the Execution Chamber of the Greensville Correctional Center and film the execution of Timothy Bunch. At that time, this Court also ruled that the Plaintiff could have a representative present at the routine autopsy of Mr. Bunch. Both of these measures were Ordered for the furtherance of discovery in this class action now before this Court. This compelled discovery was narrowly tailored in an attempt to avoid interfering with the state's execution procedures.

The Defendant promptly appealed this Court's decision to the Fourth Circuit Court of Appeals, and on December 10, 1992, in In Re Ellis B. Wright, No. 92-7229 (4th Cir. Dec. 10, 1992), the Fourth

Circuit reversed this Court's ruling that allowed the Plaintiff in this action to videotape the execution of Timothy Bunch. Although this Court viewed the Order allowing the Plaintiff to videotape the Bunch execution as a discovery procedure specifically designed to avoid interfering with the execution, the Fourth Circuit found that the presence of a video camera did present an interference and cast grave doubt on whether this Court had any jurisdiction to act on that premise. Additionally, the appellate court Ordered, subsequent to the death of Timothy Bunch, all relief requested by the motion of December 10, 1992, Dismissed as moot.

The subject matter jurisdiction of this Court has not been challenged by the parties, and the Court is reasonably satisfied of its jurisdiction to decide

the ultimate issue. There is no dispute that if this Court has jurisdiction over the case, this Court has jurisdiction over disputed discovery. See, e.g., Fed. R. Civ. P. 37 (a)(1).

The Plaintiff again requests this Court to compel, inter alia, the videotaping of the execution of Charles Stamper. For the reason stated from the Bench at the hearing on January 15, 1993, and giving proper deference to the Fourth Circuit's opinion in In Re Ellis B. Wright, supra, this request must be Denied.

The Plaintiff also requests this Court to compel the videotaping of a routine pre-execution testing of the electric chair at the Greensville Correctional Center. The Defendant's only potentially relevant objection to allowing

this discovery is that if done on the same day as the execution it may collaterally interfere with the execution preparation or procedure. This Court finds that it is not necessary for this test, or its videotaping, to be performed on the same day scheduled for an execution. Therefore, the Defendants shall be compelled to allow the Plaintiff's representatives to observe and videotape a routine preexecution testing of the electric chair at Greensville Correctional Center at a mutually agreeable time no later than twenty (20) days from the date of this Memorandum.

Finally, the Plaintiff requests that this Court compel the Defendants to allow the Plaintiff's representative, Dr. E. B. Ilgren, an eminent neuropathologist, to observe the routine autopsy following the

execution of Charles Stamper. Further, the Plaintiff request that Dr. Ilgren be allowed to collect samples of the executed inmate's brain tissue after it is removed and sectioned by the Defendants' pathologist. The Defendants can not show how passive observation of a routine autopsy can in any way interfere with the scheduled execution. For this reason, the Plaintiff will be allowed to have his expert representative present to observe the autopsy. Similarly, the Plaintiff's request that Dr. Ilgren be allowed to conduct one separate and independent test merely requires Dr. Ilgren to collect minimal samples from tissue that already will be removed and sectioned in the course of the regularly scheduled autopsy. The Court fails to see how this can possibly interfere with the Defendant's

routine or plans concerning the scheduled execution.

The Defendants' assert a misplaced objection that the discovery material requested by the Plaintiff may not be dispositive or even admissible in a trial on the merits. It is well settled that in order to be discoverable, the information sought need only appear reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26 (b) (1). The Court must also consider the limited and unique opportunity for discovery presented with each scheduled execution and the potential irreparable harm of allowing discovery to become unduly delayed. Accordingly, the Plaintiff's motion for expedited discovery and his motions to compel will be granted, except as they pertain to his request to

videotape the execution of Charles Stamper.

An appropriate Order shall follow.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

1/19/93
Date

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SYVASKY L. POYNER, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs

v. **Civil Action No. 92-CV-815**

EDWARD W. MURPHY, et al.

Defendants

NOTICE OF APPEAL

Notice is hereby given that Defendants Edward W. Murray, et al., hereby appeal to the United States Court of Appeals for the Fourth Circuit from the order entered in this case on January 19, 1993, granting the plaintiffs discovery with respect to the autopsy of Charles S. Stamper.

Respectfully submitted,

EDWARD W. MURRAY, Director
Virginia Department of
Corrections, et al.,

Defendants herein,

By: /s/ Mark R. Davis
Counsel

FILED: January 19, 1993

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-6052

SYVASKY LAFAYETTE POYNER, on behalf of himself and all others similarly situated,

Plaintiffs - Appellants,

versus

EDWARD W. MURRAY, Director, Virginia Department of Corrections, ELLIS B. WRIGHT, JR., Warden, Greensville Correctional Center, and JOHN DOE, Executioner,

Defendants - Appellees.

O R D E R

The defendants have appealed from a part of an order of the district court entered at 3:00 p.m. January 19, 1993, granting a discovery request pertaining to

the execution of Charles S. Stamper, who has been ordered to be executed by electrocution on January 19, 1993. We are advised that such executions take place in Virginia at 11:00 p.m.

The order of the district court further specifically requires the defendants to allow Dr. E. B. Ilgren to observe "the routine autopsy following the execution of Charles Stamper." The order further implicitly requires the defendants to furnish to Dr. Ilgren tissue samples from Stamper's brain tissue "after it is removed and sectioned by the defendants' pathologist."

In this case of considerable public interest, the order of the district court is not any routine discovery order but is, in fact, an injunction and we treat it as such. There is no doubt that a refusal to

comply with the district court's order of January 19, 1993 would be punishable by contempt.

We have examined the papers in the underlying case of Poyner v. Murray, No. 92-CV815. That case essentially contests the validity of the Virginia statutes requiring execution by electrocution as being invalid in violation of the Eighth Amendment because electrocution is cruel and unusual punishment.

This exact question has been decided adversely to Poyner's position by the Supreme Court of Virginia in Martin v. Commonwealth, 271 S.E.2d. 123 (Virginia 1980), a case occurring after Robinson v. California, 370 U.S. 660 (1962) and Hart v. Commonwealth, 109 S.E.2d 582 (Virginia 1921) prior to Robinson. The Virginia Court has refused to reconsider the

question in Stockton v. Commonwealth, 402 S.E.2d 196 (Virginia 1991), Hoke v. Commonwealth, 377 S.E.2d 595 (Virginia 1989), Stockton v. Commonwealth, 314 S.E.2d 371 (Virginia 1984), Townes v. Commonwealth, 362 S.E.2d 650 (Virginia 1987), and Beaver v. Commonwealth, 352 S.E.2d 342 (Virginia 1987).

WestLaw indicates at least 105 state cases in 13 jurisdictions which state or hold that electrocution is not an unconstitutional means of execution.

Two circuits, the Fifth and Eleventh, have held and stated that electrocution is not a method of execution in violation of the Eighth amendment, and two other circuits, the Fourth and Eighth, have noted in dictum that the Supreme Court approved of electrocution as a form of

execution in In Re: Kemmler, 136 U.S. 436 (2890).

Jones v. Whitley, 938 F.2d 536 (5th Cir.), cert. denied, 60 U.S.L.W. 3108 (1991)

Lindsey v. Smith, 820 F.2d 1137, 1155 (11th Cir. 1987) cert. denied, 495 U.S. 1059 (1989);

Lowenfield v. Phelps, 817 F.2d 285 (5th Cir.) cert. granted in part, 483 U.S. 1005 (1987), aff'd, 484 U.S. 231 (1988);

Wilson v. Butler, 813 F.2d 664, 678 (5th Cir.) cert. denied, 440 U.S. 976 (1979)), on reh'g, 825 F.2d 879 (5th Cir. 1987), cert. denied, 484 U.S. 1079 (1988);

Porter v. Wainwright, 805 F.2d 930, 943 n.15 (11th Cir. 1986) cert. denied, 482 U.S. 918, and cert. denied, 428 U.S. 919 (1987) ;

Funchess v. Wainwright, 788 F.2d 1443, 1446 (11th Cir.) (per curiam) cert. denied, 475 U.S. 1133 (1986);

Johnson v. Kemp, 759 F.2d 1503, 1510 (11th cir. 1985)

Watson v. Blackburn, 756 F.2d 1055, 1058 & n.1 (5th Cir. 1985) (per curiam) cert. denied, 476 U.S. 1153 (1986);

Sullivan v. Dugger, 721 F.2d 719 (11th Cir. 1983) (order)

Corn v. Zant, 708 F.2d 549, 563 (11th Cir. 1983) cert. denied, 467 U.S. 1220 (1984), vacated in part on other grounds, 772 F.2d 681 (11th Cir. 1985), vacated in part on other grounds, 478 U.S. 1016 (1986), on remand, 837 F.2d 1474 (11th Cir.), cert. denied, 486 U.S. 1023 (1988);

Spinkellink v. Wainwright, 578 F.2d 582, 616 (5th Cir. 1978) cert. denied, 440 U.S. 976 (1979);

Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970) (noting in dictum that Kemmler approved of electrocution as a form of execution), cert. denied, 408 U.S. 942 (1972);

Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (Blackmun, J.)

Kemmler held that a New York statute authorizing execution by electrocution was not invalid as against the due process clause. New York's constitution had a provision against cruel and unusual punishment, the same as the Eighth Amendment, and the New York courts had

upheld the execution as measured against the New York Constitution. As measured against the U. S. Constitution, of course narrowly read, Kemmler only holds that there was no violation of due process. Kemmler has been construed, however, by the Supreme Court albeit in dictum on the subject, as stating that electrocution is not cruel and unusual punishment under the Eighth Amendment. McClesky v. Kemp, 481 U.S. 279 (1987), Ingraham v. Wright, 430 U.S. 651 (1977), and Estelle v. Gamble, 429 U.S. 97 (1976).

Additionally, to like effect, are the opinions of Justice Powell, dissenting in Rummell v. Estelle, 445 U.s. 263, 288, and a plurality opinion in Gregg v. Georgia, 428 U.S. 153 (1976).

In addition, the Supreme Court has specifically held in Louisiana etc. v.

Resweber, 329 US. 459 (1947) that it was not cruel and unusual punishment to attempt a second execution when the first failed because of mechanical problems with the electric chair. Notably, the court stated that "[t]here is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed electrocution." 329 U.S. and 464.

In the face of all this authority, there is no contrary decision.

Accordingly, we are of opinion that the basic premise in the underlying case in the district court is entirely without merit.

It is accordingly ADJUDGED and ORDERED that the order of the district court entered January 19, 1993 and herein appealed from, shall be, and the same hereby is, reversed.

It is FURTHER ADJUDGED and ORDERED that this case shall be, and the same hereby is, remanded to the district court with directions to forthwith dismiss with prejudice the underlying case, Poyner v. Murray, No. 92-CV815. Deckert v. Independence Corp., 311 U.S. 282, 287 (1940); South Carolina ex rel. Tindal v. Block, 717 F.2d 874, 880 (4th Cir. 1983), Wright, Miller, Cooper and Gressman, Federal Practice and Procedure, 1977 § 3921.

Let our mandate issue forthwith.

With the concurrences of Judge Wilkinson and Judge Sprouse.

/s/ H. E. Widener, Jr.
U. S. Circuit Judge
For the Court

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
January 19, 1993

No. 93-6052
CA92-815-V

Poyner v. Murray

M A N D A T E

The order of this Court dated 1/19/93 takes effect today.

BERT M. MONTAGUE
CLERK

FILED
February 17, 1993

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-6052

SYVASKY LAFAYETTE POYNER,
on behalf of himself and all
those similarly situated,

Plaintiff-Appellant,

versus

EDWARD W. MURRAY, Director,
Virginia Department of Corrections,
ELLIS BE. WRIGHT, JR., Warden,
Greensville Correctional Center,
and JOHN DOE, Executioner,

Defendant-Appellee.

O R D E R

There having been no request for a poll of the court, it is accordingly ADJUDGED and ORDERED that the petition for

rehearing en banc shall be, and it hereby is, denied.

We have considered the petition for rehearing and are of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is denied.

It is FURTHER ADJUDGED and ORDERED that the petition for a recall of the mandate shall be, and it hereby is, denied.

The effect of the entry of this order is to grant Poyner's motion for expedited consideration of his petition for rehearing and petition for recall of the mandate, although, as is apparent from this order, the same are denied on their merits.

With the concurrences of Judge Wilkinson and Judge Sprouse.

/s/ H. E. Widener, Jr.

For the Court

V I R G I N I A

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

COMMONWEALTH OF VIRGINIA,	:	
Plaintiff,	:	
v.	:	Criminal No. 8129
CURTIS EUGENE WHITE,	:	
Defendant.	:	

Thursday, February 11, 1992

An EXCERPT of a hearing held in the above-styled matter in the Circuit Court for Loudoun County, Virginia, in the courthouse thereof, Leesburg, Virginia, before the Honorable JAMES H. CHAMBLIN, Judge of said Court, beginning at approximately 2:13 p.m.

A P P E A R A N C E S

On Behalf of the Commonwealth:

William T. Burch, Commonwealth's Attorney

Owen D. Basham, Assistant Commonwealth's Attorney

John H. McLees, Jr., Assistant Attorney General

On Behalf of the Defendant:

Jud A. Fischel, Esquire

Alexander H. Slaughter, Esquire
McGuire, Woods, Battle & Boothe

Harry M. Johnson, III, Esquire
Hunton & Williams

P R O C E E D I N G S

THE CLERK: Commonwealth of Virginia v. Curtis Eugene White, Criminal File No. 8129.

THE COURT: Good afternoon, everybody.

I trust by you all being here that you got the message from my Assistant, that I have denied the Motion for Reconsideration in this case, and the hearing will go forward on the 22nd.

If I could just take a couple of minutes, somewhere along the line I would like, if I have time, but just because of the press of all the other cases on the docket of this Court, to somewhere put in the record as to why I feel the defendant is entitled to the hearing on this; and also so there is no misunderstanding as to

exactly what the Court is going to allow Mr. White to try to show.

To answer the second part first, it has never, ever been my intention that this motion to prohibit the imposition of the death penalty in this case was to be an attack on electrocution as a means of execution in a general sense. It was only meant to be an attack upon the way it is done in Virginia. I don't know whether that has ever been said by me from the Bench. I tried to put that into words in the Order that I entered in the latter part of December. But I just want to make sure that everybody understands that. And I think that everybody does, primarily based upon what Mr. Johnson said when we were here two days ago.

But just briefly, several reasons why I feel that this ought to be raised:

First of all, I went back, and looking at all the Virginia cases that were cited to me, and it seems to me that it is true, there's just, for some reason, some sort of a blind adherence to this rule that came up from the decision of the U.S. Supreme Court back in 1890, that it's not cruel and unusual punishment for execution by electrocution; and that that decision was made without any real findings of fact, without any real factual basis to support it.

And it just seems to me that we are a country, we pride ourselves in our Constitution, both our U.S. Constitution, our State's Constitution, Virginia's Constitution, as being a viable working document that is supposed to work with society as society's attitudes change over periods of time.

And certainly science and technology has advanced an awful lot since 1890. And I feel that somewhere a Court has got to hear the evidence of what the state of the art is now on the effect of electricity on the human body during the course of execution by electrocution in Virginia.

Also, I really came to this conclusion when it kind of dawned upon me, and I don't profess to be a constitutional scholar, but why have many, I'm sure hundreds of thousands of hours, and Lord knows how many pieces of paper have been spent on trying to define the circumstances under which the death penalty can be imposed. And just look at the number of cases on that that have gotten to the U.S. Supreme Court. And we talk about very minute, little things, down to even questions that you ask the

jurors on determining whether or not the death penalty could be imposed, and it seems like you just draw a line. If everything is constitutionally permissible up to the time that the death penalty is imposed, you draw a line, and you don't look at how it's done, when all of it is supposed to be based upon the same constitutional provision.

I just think that it's time that some Court somewhere, if it's not me, it will probably be somebody else, so why not let it be me, and let me make this decision, and this evidence should be heard.

Now, having said that, and just so it's on the record somewhere, so somebody who is reviewing this somewhere down the road doesn't wonder sometime why I did what I did, let's go forward and deal with

what we have to deal with here this afternoon.

* * * * *

C E R T I F I C A T E

STATE OF VIRGINIA:

COUNTY OF LOUDOUN:

I, Deborah Schmid Weathersbee, Notary Public for the State of Virginia At Large, do hereby certify that I reported the foregoing by stenographic and mechanical mean, which matter was held on the date, and at the time and place set out on the title page hereof; and that the foregoing constitutes a true and accurate transcript of same.

I further certify that I am not related to any of the parties, nor am I an employee of or related to any of the attorneys representing the parties, and I have no financial interest in the outcome of this matter.

GIVEN under my hand and seal this 12th day of February, 1993.

My Commission Expires:

February 28, 1995

/s/ Deborah S. Weathersbee
Notary Public